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No. 91-1704

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

OVERSEAS MOTORS, INC., PETITIONER

v.

MIROLJUB MITKOVSKI AND
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the finding of the National Labor Relations Board that an unlawfully discharged employee was not entitled to an award of backpay because he intentionally concealed earnings he received from interim employment during the backpay period.

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OPINIONS BELOW

The opinion of the court of appeals reviewing the Board's second supplemental decision and order (Pet. App. A1-A10) is unreported. Its opinion remanding the case to the National Labor Relations Board (Board) (Pet App. A98-A106) and its opinion in the underlying unfair labor practice proceeding (Pet. App. A146-A150) are reported at 818 F.2d 517 and 721 F.2d 570, respectively. The Board's second supplemental

decision and order (Pet. App. A11-A24), including the decisions of the administrative law judge (ALJ) (Pet. App. A25-A58, A59-A97), is reported at 299 N.L.R.B. No. 158. The Board's first supplemental decision and order (Pet. App. A107-A108) is reported at 277 N.L.R.B. 552, and its decision and order in the underlying unfair labor practice proceeding (Pet. App. A151-A154) is reported at 260 N.L.R.B. 810.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 1992. A petition for rehearing was denied on March 12, 1992. Pet. App. A171. The petition for a writ of certiorari was filed on April 27, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 11, 1982, the Board found that petitioner had unlawfully discharged mechanic Miroljub Mitkovski on October 23, 1980, in violation of Section 8(a)(4) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(4) and (1), because Mitkovski had contacted the Board and filed an unfair labor practice charge against petitioner. The Board ordered petitioner, *inter alia*, to offer Mitkovski full reinstatement and to make him whole for any loss of pay he may have suffered by reason of petitioner's discrimination against him. Pet. App. A151-A152, A167, A169-A170. On November 23, 1983, the court of appeals enforced the Board's order in its entirety. *Id.* at A150.

Petitioner refused to reinstate Mitkovski. The Board therefore filed a civil contempt action in the court of appeals to compel petitioner to reinstate him. Following the court's issuance of an order to show cause, petitioner agreed to reinstate Mitkovski on

July 11, 1984. Upon the Board's motion, the contempt proceeding was dismissed without prejudice. Pet. App. A99.

2. The parties were unable to agree upon the amount of backpay due Mitkovski. The Board's Regional Office therefore began a backpay proceeding pursuant to the Board's Rules and Regulations, Series 8, as amended, 29 C.F.R. 102.52 *et seq.* After a hearing, the ALJ recommended that Mitkovski be awarded backpay of $93,648.73, plus interest. That sum represented the difference between the approximately $108,000 Mitkovski would have earned during the four-year backpay period, had he not been discharged, and his approximately $14,000 in interim employment earnings. On November 19, 1985, the Board adopted the ALJ's recommendation. Pet. App. A107, A144-A145.

The court of appeals remanded the case to the Board for an additional hearing, finding that the ALJ had "impermissibly restricted Overseas' cross-examination of Mitkovski regarding his interim earnings, thereby depriving Overseas of a fair hearing." Pet. App. A98. The court pointed to the large discrepancy between Mitkovski's interim earnings and unemployment compensation of about $18,000 and the $96,000 in expenses that Mitkovski admitted during the four-year period. *Id.* at A103.[1] Noting that Mitkovski claimed loans of $70,000 to account for the discrepancy between his income and his expenditures, the court concluded that petitioner was erroneously prohibited from questioning Mitkovski about these loans, about other income, and about certain expenditures,

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[1] The court noted that Mitkovski "testified that he spend [*sic*] about $2,000 a month, which would amount to $96,000 for the four-year period." Pet. App. A103.

including the cost of overseas trips taken by Mitkovski and his family. *Id.* at A104. The court further noted that Mitkovski's failure to keep records of his interim earnings and the fact that none of the income from his auto repair work or from his borrowing was reflected in any bank account records were "suspicious circumstances" warranting further scrutiny. *Ibid.* Finally, the court concluded that the fact that Mitkovski's interim earnings amounted to only 13.52% of the earnings of a representative employee during the same period required Mitkovski to show "special circumstances" that might "explain what might otherwise appear incredible." *Id.* at A105.

3. a. In his initial decision after the remand, the ALJ found that, although there was a discrepancy between Mitkovski's income and expenditures, it was insufficient to meet petitioner's burden of establishing that Mitkovski had failed to disclose additional interim earnings. He therefore reaffirmed his prior order awarding Mitkovski full backpay of $93,648.73. Pet. App. A91.

The ALJ found, based on the evidence adduced at the remand, that Mitkovski obtained various loans totalling $60,000 and that he had additional income of $18,682 derived from part-time work, self-employment, and unemployment compensation, for a total of $78,000 in gross receipts over the backpay period. Pet. App. A83, A91. The ALJ additionally found that Mitkovski's expenses were closer to $90,000 than the $96,000 cited by the court because he had diminished living expenses during lengthy trips to Yugoslavia, which decreased the $2,000 monthly expenses noted by the court of appeals. *Id.* at A83. Finally, the ALJ found that petitioner failed to prove that Mitkovski did not make reasonable efforts to find interim employment,

and had failed to call as witnesses the persons whom Mitkovski allegedly contacted in his unsuccessful efforts to obtain further interim employment. *Id.* at A84-A94. In this respect, the ALJ noted that Mitkovski had been "blackballed" by several employers offering comparable employment. *Id.* at A88, A92.

While the ALJ's decision was pending Board review, the Board, at petitioner's request, remanded the case to the ALJ for further hearings on petitioner's allegations that Mitkovski had committed perjury during the remand hearing. Pet. App. A11 n.1.

b. Based on evidence obtained in the reopened hearing, the ALJ modified his previous findings concerning Mitkovski's financial circumstances during the backpay period. The ALJ found that, of 11 promissory notes totalling $67,850, which Mitkovski had allegedly given to lenders, two of the notes (totalling $2,000) were fictitious, and one (with a face value of $5,000) was inflated by $1,400.[2] In addition, the ALJ found

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[2] Specifically, the ALJ found that Mitkovski had lied in testifying that his neighbor, Tim Keyes, loaned him $2,000. The ALJ concluded that, while Keyes had executed two notes in that amount, he had never transferred any money to Mitkovski; instead, Mitkovski told Keyes that he needed the notes to establish the source of his interim income, and that a Board agent would visit him to discuss the loans. Pet. App. A15, A34-A35, A39-A40. The ALJ further found, as to a third note, that although Mitkovski had drafted one stating that he had borrowed $5,000 from Robert Wagner, Wagner had actually loaned him only $3,600. The ALJ also found that Mitkovski lied in denying that he told Wagner that he needed the inflated note in order to show that he was using borrowed money on which to live, and that someone from the Board would be coming to speak to Wagner about the loan. *Id.* at A15, A35-A37, A41-A42.

that Mitkovski had attempted to suborn perjury with regard to a $7,500 loan that he had repaid.[3] Subtracting the $3,400 in inflated loans, the ALJ adjusted his prior calculations to show that during the backpay period Mitkovski's income from loans, interim employment, and unemployment compensation totalled $82,500. He further found that Mitkovski's expenses during this period ranged between $86,400 and $91,200.[4] The resulting shortfall was between $4,000 and $9,000. Pet. App. A16, A44, A47. The ALJ concluded that this shortfall between income and expenses, standing alone, "fails to support an inference of intentionally concealed interim earnings or that Mitkovski failed to make a reasonable effort to seek interim employment." *Id.* at A47.

The ALJ rejected petitioner's argument that Mitkovski's untruthfulness concerning the loans "undermine[d]" his previous testimony that he had sought interim employment during the backpay period. Pet. App. A48. The ALJ pointed out that Mitkovski had provided the names of the places he had sought work, that he had been blackballed by at least three of the five places where he sought work, and that petitioner had "explicitly refrain[ed] from questioning Mitkovski" with regard to his efforts to

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[3] The ALJ found that Mitkovski contacted Dale Flohr prior to the 1987 remand hearing and asked him to tell anyone who might question him that a $7,500 loan made in 1983 had not been repaid when, in fact, it had been repaid in about 1985 or 1986. Pet. App. A15-A16, A37-A38, A43.

[4] Although the court of appeals in its remand decision had stated that Mitkovski's living expenses were $2,000 a month (see note 1, *supra*), the ALJ noted that Mitkovski had actually testified that his expenses were "close to" $2,000. The ALJ thus fixed Mitkovski's expenses at either $1,800 or $1,900 per month. Pet. App. A45.

obtain work during the last two years of the backpay period. *Id.* at A49-A50.[5] The ALJ added that, while Mitkovski's lies reflected adversely on his credibility, they did not suggest that he "enjoyed any unreported earnings in the backpay period." *Id.* at A53. Rather, they suggested that Mitkovski was trying to exaggerate his expenses in order to obtain a larger backpay award from the Board in the mistaken belief that the size of his backpay award would be tied to the amount of his expenses during the backpay period. *Id.* at A53-A54. The ALJ concluded that, although the evidence adduced shows that Mitkovski was "a liar, a finagler and a suborner of perjury on immaterial elements," his "lies and subornation * * * do not support an inference that he had unreported earnings in the backpay period." *Id.* at A56-A57.

The ALJ also observed (Pet. App. A54-A55) that, while the Board will deny backpay to a discriminatee who intentionally conceals interim employment, such denial is limited to the calendar quarters in which the concealment occurs unless the employee's dishonesty makes it impossible to calculate an accurate figure for any particular quarter. *Ibid.*, citing *American Navigation Co.*, 268 N.L.R.B. 426 (1983); *Ad Art Inc.*, 280 N.L.R.B. 985 (1986). The ALJ found that principle not relevant here because "the evidence adduced both in the 1987 remanded hearing and in this 1989 reopened hearing does not show or even suggest that Mitkovski had unreported earnings in the backpay period." Pet. App. A55-A56. Accordingly, the

[5] The ALJ also noted that Mitkovski was hindered in obtaining work during some of the backpay period because he had left his tools as security for one of the loans he had obtained. Pet. App. A51.

ALJ reaffirmed his earlier order that Mitkovski be awarded backpay inthe amount of $93,648.73, plus interest. *Id.* at A57-A58.

c. The Board disagreed with the ALJ and found that Mitkovski was not entitled to any backpay. Pet. App. A18.[6] The Board stated that it construed the court of appeals' remand as shifting the burden to the General Counsel and Mitkovski to show "special circumstances" why the shortfall between Mitkovski's income and expenditures did not preclude an award of backpay. *Id.* at A18 n.13. The Board also construed the remand as precluding the reassessment of Mitkovski's expenses made by the ALJ. *Id.* at A16-A17. Accordingly, the Board found that Mitkovski had a $13,500 discrepancy between his $96,000 in expenses and $82,500 in receipts during the backpay period that could not be attributed to "anything other than income from some source or sources that Mitkovski has not reported," *id.* at A17-A18, and could not be allocated to a particular segment of the backpay period. *Id.* at A18 & n.12. In those circumstances, and "particularly in light of Mitkovski's perjury and his attempt to suborn perjury of another witness," *id.* at A18, the Board was "constrained by the court's remand to deny backpay in this case." *Id.* at A18 n.13.

4. The court of appeals, in an unpublished *per curiam* opinion, found that "the facts do not permit the Board's inference that Mitkovski intentionally concealed interim earnings." Pet. App. A2. The court stated that the issue was whether petitioner "met its burden of demonstrating that Mitkovski intentionally

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[6] Member Cracraft dissented, Pet. App. A19-A24, agreeing with the ALJ that the inference that Mitkovski concealed interim earnings was not warranted.

concealed income he received during the back pay period." *Ibid.* It concluded that substantial evidence did not support the Board's finding that the shortfall between Mitkovski's income and expenses must be attributable to unreported income. *Id.* at A9-A10. Rather, the court agreed with the ALJ that Mitkovski had adequately explained his inability to find interim employment, [7] and that petitioner had "failed to prove that Mitkovski supported himself and his family through earnings that he intentionally concealed." *Id.* at A9. Accordingly, the court remanded the case to the Board with instructions to provide backpay consistent with the ALJ's decision. *Id.* at A10.

ARGUMENT

Petitioner contends (Pet. 8) that review is warranted in this case because the court of appeals improperly interfered with the Board's processes by precluding the Board from denying backpay "to a discriminatee who committed perjury and who suborned perjury." Petitioner misstates the basis of the Board's decision, and the factbound disagreement between the Board and the court of appeals does not warrant this Court's review.

1. Contrary to petitioner's suggestion, the Board did not deny Mitkovski backpay simply because he had committed perjury. Rather, the Board interpreted the

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[7] The court stated that, while Mitkovski's interim earnings "amounted to roughly fifteen percent of the back pay award," the ALJ noted that "blackballing at several local auto dealerships made it difficult for Mitkovski to obtain employment" and that "Mitkovski could not have worked as a private mechanic to earn additional income during much of the back pay period because he left his tools as collateral for one of his loans." Pet. App. A9.

court of appeals' prior remand order as placing the burden on Mitkovski to explain the discrepancy of $13,500 between his income and expenses during the backpay period. It then concluded, "particularly in light of Mitkovski's perjury and his attempt to suborn perjury of another witness," Pet. App. A18, that he had not sustained that burden. The Board further concluded that it was "not credible" that the unexplained discrepancy of $13,500 "could be anything other than income from some source or sources that Mitkovski has not reported," and that, since the Board could not determine in which "backpay quarter or quarters [the unreported] money was received," it would "deny Mitkovski all backpay." *Id.* at A17-A18.[8]

In reversing the Board's denial of a backpay award, the court of appeals did not disagree with the remedial principles developed by the Board when confronting

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[8] The Board thus applied principles it articulated in *American Navigation Co.*, 268 N.L.R.B. 426, 428 (1983), and developed in later cases. See Pet. App. A18 n.12. In *American Navigation*, the Board stated that, in fashioning a remedy in cases where a discriminatee has intentionally concealed earnings from the Board, it must consider the public interest in assuring the integrity of its processes as well as the interest in remedying unfair labor practices. Guided by that principle, the Board distinguished the situation in which a discriminatee in compliance proceedings concealed interim earnings for certain quarters from that in which the concealment cut across all backpay quarters. In the former situation, the Board stated that a remedy that denied backpay only for the quarters in which concealed earnings occurred would effectuate the policies of the Act, whereas in the latter situation the discriminatee would be denied all backpay. See also *Ad Art, Inc.*, 280 N.L.R.B. 985, 987-989 (1986) (concurring opinion of Member Stephens); *Owens-Illinois,. Inc.*, 290 N.L.R.B. 1193, 1194, enforced, 872 F.2d 413 (3d Cir. 1989) (Table).

instances of perjury (see note 8, *supra*). Rather, the court disagreed with the Board's conclusion that the only inference to be drawn from the record was that Mitkovski had concealed interim earnings. The court, in agreement with the ALJ, found that Mitkovski's perjury in attempting to inflate the value of loans did not impeach the credibility of his testimony respecting his efforts to obtain additional interim employment.[9] The court further found that evidence showing that Mitkovski had been blackballed and had left his tools as collateral for one of his loans explained why he is entitled to a backpay award which is large relative to his interim earnings. The court thus concluded that the burden was on petitioner to show that Mitkovski had concealed earnings, and that petitioner failed to carry that burden.

2. The Board believes that its inference that Mitkovski had concealed earnings was reasonable and should not have been displaced by the court of appeals. The difference between the Board and the court of appeals, however, does not turn on a dispute over legal principles, but presents an evidentiary issue that is tied to the particular facts of this case. Such an issue of substantial evidence does not warrant this Court's review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

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[9] Similarly, Member Cracraft dissented from the Board's ruling because she also agreed with the ALJ's finding that Mitkovski did not conceal interim earnings and disagreed with the contrary inference drawn by the Board. Pet. App. A19-A24.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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